Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1999

CATHY HOWARD,

Petitioner,

vs.

OAKWOOD HOMES CORP.,

Respondent.

On Petition for a Writ of Certiorari to the North Carolina Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

ANGELA NEWELL GRAY
Counsel of Record
GRAY, NEWELL, JOHNSON & BLACKMON, LLP
P.O. Box 3071
Greensboro, NC 27402
(336) 691-9200

Attorney for Petitioner

31 pp

QUESTIONS PRESENTED

I. **Whether compulsory arbitration which is not expressly agreed to between an employer and employee in an existing employment relationship, and which requires an employee to waive a constitutional right to maintain employment, creates such an inequity in the bargaining power that it precludes resort to compulsory arbitration.**

II. **Whether, and to what extent, the FAA governs classes of workers engaged in foreign or interstate commerce.**

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 3

I. The Petition Should Be Granted Because the North Carolina Court of Appeals decision abridges the rights guaranteed under the Civil Rights Act of 1964, as amended in 1991, and the General Statutes of the state of North Carolina.

II. The Petition Should Be Granted Because the North Carolina Court of Appeals decision directly conflicts with federal law regarding the applicability of the FAA in employment cases.

Conclusion 8

TABLE OF CITATIONS

Cases Cited:

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 4

Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 8

Statutes Cited:

28 U.S.C. § 1257 1

The Civil Rights Act of 1991, 42 USC 1991§102(c)(1).... 3

North Carolina Constitution Article 1, §18 4

North Carolina Constitution Article 1, §25 4

North Carolina General Statute § 22B-10 6

INDEX TO APPENDICES

Appendix A – Opinion of the North Carolina Court of Appeals Filed July 6, 1999 1a

Appendix B – Order of the Superior Court Filed July 10, 1998 15a

Appendix C – Order of the North Carolina Supreme Court Filed August 19, 1999 18a

Petitioner, Cathy Howard, respectfully requests that a writ of certiorari be issued to review the judgment of the North Carolina Court of Appeals in this case.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is published at *Cathy Howard vs. Oakwood Homes Corp*, COA98-1101 (July 6, 1999). (App. A). The Order of the Superior Court of Guilford County, North Carolina is published at *Cathy Howard v. Oakwood Homes Corp.*, 98 CVS 5609 (July 10, 1998) (App. B).The Order denying the petition for discretionary review to the North Carolina Supreme Court is found at Appendix C.

STATEMENT OF JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on July 6, 1999. The North Carolina Supreme Court denied a timely petition for discretionary review on August 19, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, as amended in 1991, 42 USC 1991§102(c)(1) provides in pertinent part:

"If a complaining party seeks compensatory or punitive damages under this section, any party may demand a trial by jury..."

Article 1, §§ 18 and 25 to the North Carolina Constitution provide in relevant part:

"All courts shall be open: every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."

"[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable".

North Carolina General Statute § 22B-10 provides in relevant part:

"[a]ny provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable."

STATEMENT OF THE CASE

The fundamental question in this case is whether an employer may compel a current employee, as a condition of continued employment, to submit claims pertaining to discrimination and termination of employment arising under federal and state law to binding arbitration, where there is no express agreement to arbitrate between the parties. Inextricably intertwined with the aforementioned issue are two additional issues; a) whether an employer can compel an employee to waive a constitutional right as a condition of continued employment and b) whether, and to what extent, the "FAA" is applicable in situations involving workers engaged in foreign or interstate commerce. To fully appreciate the significance of the issues presented by this case, it is essential to consider this Court's previous rulings on similar, but distinguishable issues.

The petitioner, Cathy Howard, had been an employee of the respondent, Oakwood Homes since 1991 when she, along with other co-workers, was presented a memorandum by the company president informing the current employees that a mandatory dispute

resolution program had been adopted whereby current employees, as well as new hires, would be compelled to submit issues regarding discrimination, sexual harassment and termination of employment to binding arbitration. When the petitioner was subsequently terminated, she refused to participate in mandatory arbitration and instead filed suit against the respondent in state court alleging wrongful termination and race discrimination in violation of N.C.G.S. §143-422.2.[1] The respondent filed a motion to compel resort to its dispute resolution program. The trial court denied the respondent's motion, holding that the contract or "agreement" to arbitrate was unenforceable since it lacked the essential element of consideration. The North Carolina Court of Appeals reversed however, opining that there was an enforceable agreement to arbitrate within the FAA.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE NORTH CAROLINA COURT OF APPEALS DECISION ABRIDGES THE RIGHTS GUARANTEED UNDER THE CIVIL RIGHTS ACT OF 1964, AS AMENDED IN 1991, AND THE CONSTITUTION OF THE STATE OF NORTH CAROLINA.

One of the most fundamental changes to the Civil Rights Act of 1964 is set out in the simple language of §102(c)(1) of the 1991 Amendments. "If a complaining party seeks compensatory or punitive damages under this section, any party may demand a trial by jury..."

With the promulgation of the Civil Rights Act of 1964 came a legal mechanism to eliminate the ill of discrimination in

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[1] N.C.G.S. 143-422.2 is a state anti-discrimination in employment statute which substantially mirrors Title VII in substance and application. The state statute also provides for a right to a jury trial.

employment, and in 1991, the amendment to the Civil Rights Act further unleashed powers previously unknown. The right to a jury trial elevated the potential for damages, and many believed, leveled the playing field for plaintiffs in discrimination cases. Unfortunately however, that which the federal statute has given, states are swiftly taking away, as evidenced by the North Carolina Court of Appeals decision in the present case.

Like the argument in Justice Steven's dissenting opinion in *Gilmer v. Interstate/Johnson*, 500 U.S. 20 (1991), I too agree that compulsory arbitration conflicts with the congressional purpose of Title VII, however for a different reason. The primary problem raised by this case is not whether arbitration is a useful or valuable tool in resolving discrimination suits, but rather, whether arbitration which is compulsory violates the plaintiff's right to select the judicial forum within which to bring an action, and ultimately, whether it violates the plaintiff's right to a jury trial. Certainly enough can be said about the merits of arbitration, and much has been said in *Gilmer* about the positive affects of arbitration. However, this case is substantively distinct from *Gilmer*. This case does not involve a union, and it does not involve an agreement. Rather, it involves a single employee, being compelled to waive a constitutional right in order to keep her job.

Although the plaintiff in the present case elected to sue in the state court pursuant to a state anti-discrimination statute, she is nonetheless similarly situated to any Title VII plaintiff. By providing the right to a jury trial, the legislative intent of the state statute remains consistent with Title VII, and with the North Carolina Constitution. Article 1, § 18 states that:

"All courts shall be open: every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

Similarly, § 25 sets forth the same standard for an individual's right to a jury trial in civil cases. It states:

" [i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

On these facts, it is apparent that any provision in an employment "agreement" which requires a waiver of trial by jury violates the fundamental provisions of the North Carolina Constitution, as well as those of the 1991 Amendments to the Civil Rights Act of 1964.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE NORTH CAROLINA COURT OF APPEALS DECISION DIRECTLY CONFLICTS WITH FEDERAL LAW REGARDING THE APPLICABILITY OF ARBITRATION IN EMPLOYMENT UNDER THE FAA.

In *Gilmer*, this Court refrained from addressing the issue of whether contracts of employment fall within the gambit of the FAA since that issue was not raised in the petitioner's petition and, since it also determined that the arbitration agreement in *Gilmer* was not between an employer and an employee. This Court, by granting the present petition for writ of certiorari, can settle the issue of whether, and to what extent, workers engaged in foreign and interstate commerce are covered under the FAA.

Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This Court, having made no definitive assertions, has left the lower courts free to define Section 1 of the FAA. As one would expect, there is much confusion. Read

literally, this Section clearly pertains to workers engaged in foreign and interstate commerce, without limitation. The respondent in the present case, among other things, is a manufacturer and distributor of mobile and modular homes, with offices, stores and showrooms located throughout the nation. Essentially then it would follow that any of the respondent's employees would be included in the category of workers engaged in foreign and interstate commerce.

Even if this Court were to determine that Section 1 of the FAA does apply in this case, other sections of the FAA would preclude its application. Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract**. " Moreover, Section 4 of the FAA grants federal district courts the power to compel arbitration "**upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue**." In the present case, both sections 2 and 4 are applicable.

First of all, the respondent's dispute resolution program conflicts with well-settled principles of contract law, and thus is unenforceable pursuant to the FAA. Section 22B-10 of the North Carolina General Statutes addresses the issue of jury trials by stating:

"[a]ny provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable."

Secondly, the making of the agreement for arbitration in this case is an issue. Here, the respondent never provided the petitioner with an opportunity to agree to arbitrate; rather it made compliance a mandatory requirement to maintaining employment. The respondent simply gave notice to its employees that if they continued to work for the company after a certain date, they would be deemed to have acquiesced to the new terms. Although the petitioner vehemently rejected of the compulsory arbitration

mandate, the respondent *continued to employ her and ultimately* terminated her on other grounds. The North Carolina Court of Appeals patently disregarded this pivotal fact, opting to view the petitioner's decision to continue to work as an acquiescence.

Gilmer is this Court's last word on the issue of compulsory arbitration. In reaching its decision in 1991, this Court held in pertinent part, that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Although not persuaded by the petitioner's argument in *Gilmer* regarding the inequities of arbitration, this Court went on to say that the claim of unequal bargaining power in arbitration is best left for resolution in specific cases.

Although we are mindful of this Court's opinion in *Gilmer* that mere inequality in bargaining power alone is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context, we are convinced that the inequality in bargaining power between an employer and a current employee under the present facts exemplifies such an inequity as to render the agreement unenforceable, and necessitating the high Court's review.

In his dissenting opinion in *Gilmer*, Justice Stevens eloquently recalled the comments of Senator Walsh during the Senate Judiciary Subcommittee hearings on the proposed bill. Senator Walsh's poignant statement so exemplifies the plight of the petitioner in the present case, that wisdom and foresight together predicted the deleterious affect such an agreement could ultimately have on a layperson. "A man says, 'these are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except sign it; and then he surrenders his right to have his case tried by the court..."

CONCLUSION

There are compelling reasons why this Court should grant the petition for writ of certiorari. First, the North Carolina Court of Appeals decision impacts an important federal question which has not been settled by this Court. In *Gilmer*, this Court addressed issues pertaining to arbitration agreements in the employment context where either an actual employment contract existed, was being proposed, or where there was an express agreement to arbitrate between the parties. Here, the lower court has expanded this Court's previous decisions in a manner which is not only conflicting, but also abridges the rights provided to individuals through the several federal and state anti-discrimination statutes guaranteeing access to the judicial process.

The dispute resolution program discussed in the present case has far-reaching implications since the respondent employs thousands of individuals throughout the nation. Courts of different states may, and in some instances, have addressed this or similar issues, and have rendered different and conflicting opinions. (*See e.g., Paladino vs. Avnet Computer Technologies, Inc.*, 134 F.3d 1054)(11th Cir. 1998). The scope and nature of a decision by this Court on these issues is compelling for all citizens of this country, and will set a precedence as to the degree to which employee's rights under the Civil Rights Act of 1964, as well as other state anti-discrimination statutes can be abridged by an employer.

Respectfully submitted

ANGELA NEWELL GRAY
Counsel of Record
GRAY, NEWELL, JOHNSON & BLACKMON, LLP
P.O. Box 3071
Greensboro, North Carolina 27402
(336) 691-9200

Attorney for Petitioner

APPENDIX A

NO. COA98-1101

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 1999

CATHY HOWARD,
Plaintiff-Appellee,

V.

Guilford County
No. 98 CVS 560

OAKWOOD HOMES CORP.,
Defendant-Appellant.

Appeal by defendant from judgment entered 9 July 1998 by Judge Catherine Eagles in Guilford County Superior Court. Heard in The Court of Appeals 20 April 1999.

Gray, Newell & Johnson, LLP. by Angela Newell Gray, for plaintiff-appellee.

Constangy, Brooks & Smith, LLC, by W.R. Loftis, Jr., and Virginia A. Piekarski, for defendant-appellant.

MARTIN, Judge.

Defendant Oakwood Homes Corp. appeals the denial of its motion to compel arbitration and stay judicial proceedings in the underlying civil action. Briefly summarized, the record discloses that defendant manufactures and sells homes throughout the United States and employs approximately 9,600 employees to that end. Plaintiff Cathy Howard began employment with defendant on a temporary basis in 1991, and accepted a full time position as an at-will employee in defendant's Title Department in September 1992.

On 1 May 1997, defendant implemented a Dispute Resolution Program ("DRP") requiring defendant and its employees to submit to dispute resolution as the exclusive means of resolving a variety of employment disputes, including those arising out of an employee's termination. The program provides that an employee with a claim may submit a written complaint to defendant's Director of Human Resources. The complaint is then investigated, and an answer is provided to the employee. If the employee is not satisfied, the employee may request non-binding

mediation conducted by a mediator provided by the American Arbitration Association. If the defendant and the employee are unable to resolve the dispute through mediation, the employee may elect to submit the dispute to binding arbitration in which the arbitrator may grant any remedy or relief that would have been available through the courts. Under the DRP, all arbitrations are conducted in accordance with the Federal Arbitration Act ("FAA").

Prior to the 1 May 1997 effective date of the DRP, on 1 April 1997, defendant's Vice-President of Human Resources mailed to covered employees a copy of the DRP with a memorandum informing employees that both defendant and the employee would be bound by the program, and that an employee's decision to continue employment with defendant would constitute an agreement to be bound by the terms of the DRP. Additionally, on 7 April 1997, Paul Macksood, defendant's Director of Human Resources, distributed an office memorandum to employees informing them of scheduled meetings at which employees were to be instructed on the terms of the DRP and permitted to ask questions about it.

On 3 June 1997, following implementation of the DRP, plaintiff's employment with defendant was terminated for poor performance. Plaintiff complained that she was not issued a final warning prior to her termination. In response to her complaint, Mr. Macksood informed plaintiff that her claim was treated as though it had been brought under the DRP, that it had been investigated accordingly, and although defendant was not required to issue plaintiff a final warning, defendant would provide plaintiff another opportunity to improve her level of performance. Plaintiff's termination was rescinded. Mr. Macksood reminded plaintiff by letter that she was bound by the DRP and attached a copy of the program thereto.

On 18 July 1997 plaintiff was again terminated for poor performance, and on 23 April 1998 she commenced the underlying civil action against defendant, alleging wrongful termination, negligent infliction of emotional distress, negligent supervision, negligent retention, and intentional infliction of emotional distress. On 12 June 1998 defendant moved for an order to stay judicial proceedings and compel plaintiff to submit her claim to dispute resolution pursuant to the DRP. The trial court denied defendant's

motion, concluding that no agreement to arbitrate existed due to lack of consideration.

Where a trial court's order, such as the order *sub judice,* fails to resolve all issues between all parties in an action, the order is not a final judgment, but rather is interlocutory. *First Atlantic Management Corp. v. Dunlea Realty Co.,* _ N.C. App. _, 507 S.E.2d 56 (1998). While an interlocutory order is generally not directly appealable, such an order will be considered " 'if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.' " *N. C. Ins. Guar. Ass'n v. Burnette,* ____ N.C. App. _, 508 S.E.2d 837, 839 (1998) (citation omitted) ; *see also N.C.* Gen. Stat. § 1-277, 7A-27. The right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable. *Burke v. Wilkins,* _____N.C. App. ____, _____, 507 S.E.2d 913 (1998).

In its sole assignment of error, defendant argues that its motion to compel arbitration should have been granted, and that

the trial court erred in concluding that the DRP was not an enforceable agreement due to lack of consideration. We agree.

We note at the outset that North Carolina ""has a strong public policy favoring the settlement of disputes by arbitration", and that "[our] Supreme Court has held that where there is any doubt concerning the existence of an arbitration agreement, it should be resolved in favor of arbitration." *Martin v. Vance,*____ N.C. App. ____, _____, _____, S.E.2d _____, _____, (slip opinion no. 98-649, filed 4 May 1999) (citing *Johnston County v. R. N. Rouse & Co.*,331 N.C. 88, 91-92, 414 S.E.2d 30, 32 (1992)). Although arbitration is favored in the law, in order to be enforced, the underlying agreement must first be shown to be valid as determined by a common law contract analysis. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 423 S.E.2d 791 (1992). It is a basic principle of contract law that in order to be valid, an agreement must be supported by adequate consideration. *Deans v. Layton, 89* N.C. App. 358, 368, 366 S.E.2d 560, 567, *disc. review* denied, 322 N.C. 834, 371 S.E.2d 276 (1988) (citation omitted). "Mutual promises may constitute reciprocal consideration to support a contract." *Id.*

In *Vance, supra,* this Court recently ruled on the validity of an agreement to arbitrate in the employment context. The plaintiff in *Vance* had been employed with the defendant since 1990, and in 1994 the defendant implemented an alternative dispute resolution grievance procedure which was set forth in the personnel policy manual. In holding that the agreement was supported by adequate consideration, this Court stated,

> ...the agreement to arbitrate does not fail for lack of consideration. Mutual binding promises provide adequate consideration to support a contract. Where each party agrees to be bound by an arbitration agreement, there is sufficient consideration to uphold the agreement.

Vance at S.E.2d at (citations omitted). The *Vance* court noted that other jurisdictions have held that mutual promises to arbitrate constitute sufficient consideration, specifically citing the Fourth Circuit opinions in *O'Neil v. Hilton Head Hospital, 115* F.3d 272 (4th Cir. 1997), and *Johnson v. Circuit City Stores, 148* F.3d 373 (4th Cir. 1998). We too find such cases instructive.

In *O'Neil,* the plaintiff had been employed with defendant hospital since 1991. In 1994, the plaintiff signed an agreement that she would arbitrate all claims as a condition of her continued

employment. *O'Neil* at 273. The plaintiff was subsequently terminated, and she filed suit, arguing that the agreement was invalid for lack of consideration where it was not binding on the hospital. *Id.* at 274-75. The Fourth Circuit, in holding that the agreement was mutually binding, stated that the employer's proffer of the agreement implied that both employer and employee would be bound by the agreement, and that the employer had consistently argued that it was bound by the agreement. Id. at 275. The court held that a mutual agreement existed, and that a mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement." Id. (citation omitted).

In Johnson, the Fourth Circuit reversed the district court's conclusion that an arbitration agreement was void for lack of consideration, and held that an agreement between the parties to be bound by the same rules was sufficient consideration to support the arbitration agreement. *Johnson* at 378. The court stated,

> As in *O'Neil*, both parties in this case agreed to be bound by the arbitration process for the resolution of any claim required to be submitted to arbitration under the Dispute Resolution Agreement. Therefore, we hold

> that the Dispute Resolution Agreement was supported by adequate consideration. no consideration above and beyond the agreement to be bound by the arbitration process was required.

Id. Following this Court's holding in *Vance,* and applying the reasoning of *O'Neil and Johnson,* we hold that the mutual promise to abide by the provisions of the DRP and to relinquish the right to pursue certain disputes in court is sufficient consideration to support the DRP agreement.

Moreover, we are unpersuaded by plaintiff's argument that there was no mutual agreement to be bound by the terms of the DRP. As in *O'Neil, supra,* by proffering the DRP, defendant has at least implicitly agreed to be mutually bound by the DRP, and, as in O'Neil, defendant has consistently argued that it is bound by the DRP and has shown a commitment to arbitration by virtue of this action. Moreover, the DRP provides that all arbitrations are to be conducted pursuant to the FAA. The FAA requires that agreements to arbitrate be in writing, however, such agreements need not be signed. *See Real Color Displays, Inc. v. Universal Applied Technologies Corp., 950* F. Supp. 714 (E.D.N.C. 1997) (As in contract law, the FAA imposes no requirement that a written arbitration agreement be signed by the party to be charged,

and it is sufficient that a party by act or conduct commits himself to the agreement.).

In *Vance*, we noted that where the language of a contract is clear and unambiguous, we must interpret the contract as written. *Vance, supra (citing Robbins v. Trading Post, 253* N.C. 474, 117 S.E.2d 438 (1960)). The *Vance* court, upon noting that the plaintiff had actually signed the contract, the terms of which unambiguously bound her to arbitration, held it unnecessary to look beyond the writing to determine if mutual assent existed. *Id.* In the present case, however, plaintiff did not sign the agreement, and, while the terms of the DRP unambiguously bound her to the agreement should she continue employment through 1 May 1997, we look beyond the writing to determine if mutual assent to the terms of the DRP existed.

An examination of the record shows that plaintiff continued in defendant's employment with actual notice that the terms of the DRP would be mutually effective 1 May 1997, and she therefore evidenced her mutual assent to the terms of the DRP by continuing in her employment. Defendant mailed to plaintiff's

home on 1 April 1997 a copy of the DRP as well as a memorandum regarding the requirements and effective date of the program. On 7 April 1997 defendant notified employees of the impending implementation, as well as a schedule of meetings where employees could learn and ask questions about the DRP. Plaintiff again received a copy of the DRP by mail on 24 June 1997 accompanied by a letter from Mr. Macksood informing her that her prior employment dispute had been handled pursuant to the terms of the DRP. Moreover, plaintiff, in a complaint filed with the Equal Employment Opportunities Commission, acknowledged existence of the DRP agreement and that the recession of her initial termination occurred as a result of DRP procedures. We hold such evidence to be sufficient to show plaintiff knew that the terms of the DRP would apply to her should she continue in her employment, and that by doing so, plaintiff mutually assented to the program. Both plaintiff and defendant were mutually bound by the terms of the DRP, and such mutuality provided the consideration necessary to support the agreement.

We, of course, are advertent to the decisional law in this State which holds that the prospect of continued employment is insufficient consideration to support a covenant not to compete where the employee receives "no change in compensation, commission, duties, nature of employment or other consideration in exchange for signing the agreement." *Cox v. Dine-A-Mate, Inc.*, ___ *N.C.* App. ____, _____, 501 S.E.2d 353, 356, *disc. review* denied, 349 N.C. 355, _ S.E.2d - (1998). In *Milner Airco, Inc. v. Morris,* 111 N.C. App. 866, 870, 433 S.E.2d 811, 814 (1993), this Court held a non-compete agreement to be unsupported by sufficient consideration where the employer "made no new promise that he was required to keep in return for the promise not to compete."

Plaintiff argues that the principle of such cases should apply here. Unlike a covenant not to compete, however, an arbitration agreement requires a new promise from both parties which mutually changes the nature of the employment relationship in that both parties relinquish their right to pursue certain employment disputes in court. As stated above, this mutual

promise is new and sufficient consideration to support the agreement. Moreover, the principle that continued employment alone is insufficient consideration is applied in the context of covenants not to compete which invoke policy concerns and are disfavored by the law, whereas agreements to arbitrate are favored and encouraged. *See Cox v. Dine-A-Mate, supra* (in order to be valid, covenant not to compete must be shown to be reasonable and not against public policy); *Johnston County v. R.N. Rouse & Co., supra* (North Carolina has strong public policy favoring agreements to arbitrate).

Additionally, plaintiff argues that the DRP is egregious and violative of plaintiff's constitutional rights. However, the trial court's sole conclusion of law in denying defendant's motion to compel arbitration pursuant to the DRP was that no agreement to arbitrate exists between the parties "since there was no valid consideration." Plaintiff has not cross-assigned error to the trial court's failure to find and conclude, as an alternative basis for denying defendant's motion, that the DRP was egregious and violative of plaintiff's constitutional rights. We therefore do not

consider plaintiff's argument. *See* N.C.R. App. P. 10(d) (appellee may cross-assign as error any action or omission of the trial court depriving appellee of alternative basis in law for supporting the trial court's order); N.C.R. App. P. 10(a) ("scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10"); *Albrecht v. Dorsett*, ___ N.C. App. _, 508 S.E.2d 319 (1998).

The order of the trial court denying defendant's motion to compel dispute resolution and stay judicial proceedings is hereby reversed, and this case is remanded to the trial court for entry of an order granting defendant's motion.

Reversed and remanded.

Judges GREENE and McGEE concur.

APPENDIX B

STATE OF NORTH CAROLINA COURT OF JUSTICE	IN THE GENERAL SUPERIOR COURT
GUILFORD COUNTY	98 CVS 5609

Cathy Howard,
Plaintiff,

vs.

Oakwood Homes Corporation,
Defendant.

ORDER

THIS MATTER COMING ON TO BE HEARD, and being heard on the motion of the Defendant to compel resort to dispute resolution program and to stay judicial proceedings, at the June 29, 1998 civil, non-jury session of the Superior Court of Guilford County, Greensboro, North Carolina, before the Honorable Catherine Eagles, Judge Presiding. And it appearing to the Court that the plaintiff is represented by Angela Newell Gray, and the defendant is represented by W. R. Loftis, Jr.; and, after hearing the arguments of counsel and upon review of the court file, the Court makes the following

FINDINGS OF FACT

1) The Plaintiff began her employment with the Defendant Company working in the Title Department in September, 1992.

2) The Plaintiff has never held an employment contract with the Defendant Company, and was thus classified as an employee at will.

3) Effective May 1, 1997, the Defendant Company established a mandatory program for resolution of any employment disputes alleging discrimination, harassment, wrongful termination or constructive discharge. The program was mandatory for all employees hired on or after May 1, 1997 and all employees who continued employment after May 1, 1997, would be deemed to have accepted the Program as the sole mechanism to resolve employment disputes. The employees would therefore have no right to litigate claims in any court or in any other judicial type proceedings.

4) The Defendant, through the institution of the "Program", did not elevate the Plaintiff s employment status from at-will to contractual.

5) There was no signature by either party indicating an agreement to the terms of the "Dispute Resolution Program".

6) The Defendant did not offer the plaintiff any consideration in exchange for her waiver of her right to access the courts of this State, and for her acquiescence to the terms of the "Dispute Resolution Program".

7) Although the Plaintiff continued her employment with the defendant company after the institution of the "Dispute Resolution Program", she did not acquiesce to the terms of the program.

8) On June 3, 1997, the Plaintiff received a memorandum from her then supervisor, Vicki Deaton, informing her that she was being, terminated effective July 18, 1997, allegedly for poor job performance. The Plaintiff was also advised that any dispute she had regarding her termination of employment would have to be heard through arbitration pursuant to the Defendant's "Dispute Resolution Program."

9) Upon obtaining legal representation, the Plaintiff advised the Defendant Company that she would not participate in the "Dispute Resolution Program" because she believed it was illegal and violated her constitutional rights. Plaintiff then filed this action in the Guilford County Superior Court Division.

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING

CONCLUSIONS OF LAW

1) That since there was no valid consideration, no contract or agreement to arbitrate exists as between the two parties.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED;

1) That the Defendant's motion to compel resort to dispute resolution program and to stay judicial proceedings is denied.

This the 9th day of July, 1998.

Judge Presiding

APPENDIX C

No.340P99 EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Howard v Homes)

CATHY HOWARD

v

OAKWOOD HOMES CORP.

From NC Court of Appeals
(COA98-1101)
From Guilford
(98CVS5609)

ORDER

Upon consideration of the petition filed by Plaintiff for Writ of Supersedeas and Motion for Temporary Stay of the judgment of the Court of Appeals in this matter, the following

order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 19th day of August 1999.

s/ Wainwright, J.
For the Court"

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 19th day of August 1999.

s/ Wainwright, J.
For the Court"

WTNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of August 1999.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Copy to:
North Carolina Court of Appeals
Ms. Angela Newell Gray, Attorney at Law, For Howard
Mr. W. R. Loftis, Jr., Attorney at Law, For Oakwood Homes Corp.
Virginia A. Piekarski
Attorney at Law for Defendant-Appellee
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
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No. 99-921

Supreme Court, U.S.
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In The
Supreme Court of the United States

CATHY HOWARD,

Petitioner,

v.

OAKWOOD HOMES CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. R. Loftis, Jr.
Counsel of Record
CONSTANGY, BROOKS & SMITH, LLC
101 South Stratford Road
Suite 300
Winston-Salem, North Carolina 27104-4224
(336) 721-1001

Counsel for Respondent

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

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QUESTIONS PRESENTED

1. Whether Petitioner may properly challenge the North Carolina Court of Appeals' ruling on the basis that it violates certain state constitutional rights and federal statutory rights where she did not cross-assign error to the trial court's failure to find and conclude, as an alternative basis for denying Respondent's motion, that enforcement of the DRP violated those rights?

2. Whether the North Carolina Court of Appeals erred in reversing the order of the trial court denying Respondent's motion to compel dispute resolution and stay judicial proceedings where it found under well-established state contract law that a valid arbitration agreement supported by consideration existed between Petitioner and Respondent?

CORPORATE DISCLOSURE STATEMENT

Respondent has no parent corporation, nor does any publicly held company own ten percent or more of Respondent's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS AND RULES 1

STATEMENT OF THE CASE 3

ARGUMENT 5

I. PETITIONER'S CLAIMS THAT THE DRP VIOLATES HER FEDERAL STATUTORY RIGHTS ARE NOT PROPERLY BEFORE THIS COURT BECAUSE SHE FAILED TO RAISE THOSE ISSUES BELOW 5

II. THE COURT OF APPEALS CORRECTLY FOUND THAT A VALID ARBITRATION AGREEMENT SUPPORTED BY CONSIDERATION EXISTED BETWEEN PETITIONER AND RESPONDENT 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases Cited:

Albrecht v. Dorsett,
131 N.C. App. 502, 508 S.E. 2d 319 (1998).....5

Bentley v. N.C. Insurance Guaranty Ass'n,
107 N.C. App. 1, 418 S.E. 2d 705 (1992).....6

Brown v. Brown,
112 N.C. App. 614, 436 S.E. 2d 404 (1993).....5

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20, 111 S. Ct. 1647 (1991).....6, 7, 9

Hooters of America, Inc. v. Phillips,
173 F.3d 933 (4th Cir. 1999).....6

Johnson v. Circuit City Stores, Inc.,
148 F.3d 373 (4th Cir. 1998).....6

Miller v. Two State Construction Co., Inc.,
118 N.C. App. 412, 455 S.E. 2d 678 (1995).....6, 8

Morley Construction Co. v. Maryland Casualty Co.,
300 U.S. 185, 57 S. Ct. 325 (1937).....6, 7

Statutes Cited:

9 U.S.C. § 1 *et. seq.* 3, 7, 9

42 U.S.C. § 1981 a(c)(1).....1, 5, 6

N.C.G.S. § 22 B-10.....1, 7, 8

Rules Cited:

N.C. App. P. 10(d)..... 1, 2, 5

Other Authorities Cited:

North Carolina Constitution, Article I, §§ 18, 25..... 5

STATUTORY PROVISIONS AND RULES

Petitioner has provided only a portion of the text of North Carolina General Statutes, Section 22B-10. The complete text of North Carolina General Statutes, Section 22B-10 provides:

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.

N.C.G.S. § 22B-10.

Section 102(c)(1) of the Civil Rights Act of 1991 provides:

(c) Jury Trial

If a complaining party seeks compensatory or punitive damages under this section —

(1) any party may demand a trial by jury; and

42 U.S.C. § 1981a(c).

Rule 10(d) of the North Carolina Rules of Appellate Procedure provides in pertinent part:

(d) Cross-Assignments of Error by Appellee

> Without taking an appeal an appellee may cross-assign as error any action or omission of

the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken....

N.C.R.App.P. 10(d).

STATEMENT OF THE CASE

Respondent is engaged in the manufacture and sale of manufactured homes throughout the United States. Pet., p. A2a. On May 1, 1997, Respondent implemented an internal Dispute Resolution Program ("DRP") which both Respondent and its employees are required to use as the sole means of resolving covered employment disputes, including disputes arising out of an employee's termination. Pet., p. A2a. The DRP includes a provision for binding arbitration in which the arbitrator may grant any remedy or relief that would have been available through the courts. Pet., p. A3a. Under the DRP, all arbitrations are conducted in accordance with the Federal Arbitration Act, 9 U.S.C § 1 *et seq.* ("FAA").

In July 1997, Respondent terminated Petitioner's employment for poor performance. Pet., p. A4a. Subsequently, Petitioner filed a civil action in North Carolina state court, alleging various state law claims arising out of her discharge. Pet., p. A4a. Respondent then moved for an order to stay judicial proceedings and compel Petitioner to submit her claim to dispute resolution pursuant to the DRP. Pet., p. A4a. The trial court denied Respondent's motion. Pet., p. B17a. Its sole conclusion of law in denying the motion was that the agreement to arbitrate failed for lack of consideration. Pet., p. B17a; *see also* Pet., p. A13a.

Respondent appealed the order of the trial court, arguing solely that the trial court erred in concluding that the DRP was not an enforceable agreement due to lack of consideration. Pet., p. A6a. Petitioner did not cross-assign error to the trial court's failure to find any alternative bases for denying Respondent's motion. Pet., p. A13a.

On appeal, the North Carolina Court of Appeals reversed the trial court's order denying Respondent's motion to compel dispute resolution. Pet., p. A14a. In its decision, the Court of Appeals concluded that the record evidence showed Petitioner knew that the terms of the DRP would apply to her

should she continue her employment, and that by doing so, Petitioner mutually assented to the program. Pet., p. A11a. The Court of Appeals further concluded that, because both Petitioner and Respondent were mutually bound by the terms of the DRP, such mutuality provided the consideration necessary to support the agreement. Pet., p. A11a. Petitioner's subsequent petition to the Supreme Court of North Carolina for a Writ of Supersedeas and Motion for Temporary Stay of the judgment of the Court of Appeals was denied on August 19, 1999. Pet., pp. C18a-C19a.

This petition followed.

ARGUMENT

I. PETITIONER'S CLAIMS THAT THE DRP VIOLATES HER FEDERAL STATUTORY RIGHTS AND STATE CONSTITUTIONAL RIGHTS ARE NOT PROPERLY BEFORE THIS COURT BECAUSE SHE FAILED TO RAISE THOSE ISSUES BELOW.

In Part I of her Petition, Petitioner contends for the first time that the DRP's arbitration provision violates both Section 102(c)(1) of the Civil Rights Act of 1991, 42 U.S.C. § 1981a(c)(1), and Article I §§ 18 and 25 of the North Carolina Constitution because the DRP limits her access to the courts and deprives her of the right to a jury trial. This contention must fail because neither of these issues is properly before this Court.

In the proceedings below, the trial court's sole conclusion of law in denying Respondent's motion to compel arbitration pursuant to the DRP was that no agreement to arbitrate existed between the parties because "...there was no valid consideration." Pet., p. B17a. This was the finding that Respondent timely appealed. Pet., p. A5a-A6a. Under North Carolina's Rules of Appellate Procedure, an *appellee* may also cross-assign as error any action or omission of the trial court "which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R.App. P. 10(d); *see also Albrecht v. Dorsett*, 131 N.C. App. 502, 504, 508 S.E.2d 319, 321 (1998); *Brown v. Brown*, 112 N.C. App. 614, 618, 436 S.E.2d 404, 407 (1993). Here, however, Petitioner did not exercise this right and cross-assign error to the trial court's failure to find and conclude, as an alternative basis for denying Respondent's motion, that the DRP violated Petitioner's state constitutional rights or federal statutory rights. Pet., p. A13a-A14a. As a result, the North Carolina Court of Appeals

correctly declined to consider Petitioner's argument regarding the constitutionality of the arbitration provision, which was raised for the first time in her brief submitted to that court. Pet., pp. A13a-A14a.

For the same reason, Petitioner may not raise this and other like issues here. As this Court has repeatedly ruled, an appellate court may review only those issues properly raised on appeal. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S. Ct. 325 (1937) (a party may not, in the absence of a cross-appeal, "attack the decree with a view of either enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below"). Accordingly, because the issues Petitioner raises now with respect to the validity of the DRP under the state constitution and Civil Rights Act of 1991 are not legitimately before this Court, they cannot provide the basis for granting the instant petition.

Even if Petitioner had properly raised either of the above issues in the court below, they would have failed on the merits. North Carolina's courts have already expressly ruled that there is no constitutional impediment to arbitration agreements. *Miller v. Two State Construction Company, Inc.*, 118 N.C. App. 412, 416-17, 455 S.E.2d. 678, 681 (1995) (relying on its reasoning in *Bentley v. N.C. Insurance Guaranty Ass'n*, 107 N.C. App. 1, 418 S.E.2d 705 (1992)). Similarly, with respect to Petitioner's argument regarding the arbitrability of statutory discrimination claims, this Court has already held that judicial protection extends to predispute agreements to arbitrate such claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). *See also Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (involving Title VII claim); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 376 (4th Cir. 1998) (involving 42 U.S.C. § 1981 claim). Therefore, for this reason as well, Petitioner's claims premised on the 1991 Civil Rights Act and

North Carolina's constitution are baseless and cannot be relied upon to support the instant petition.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT A VALID ARBITRATION AGREEMENT SUPPORTED BY CONSIDERATION EXISTED BETWEEN PETITIONER AND RESPONDENT.

In Part II of her petition, Petitioner also claims that the Court of Appeals' decision is inconsistent with Sections 1, 2 and 4 of the FAA, as well as Section 22B-10 of the North Carolina General Statutes. 9 U.S.C. §§ 1, 2, 4; N.C.G.S. § 22B-10; Pet., pp. 5-7. Like the issues discussed in Point I, *supra*, Petitioner did not raise these issues in the court below, nor were they addressed there. Pet., pp. A1a-A14a. Accordingly, they are not properly before this Court. *Morley Construction Co.*, 300 U.S. at 191, 57 S. Ct. at 325; *see also Gilmer*, 500 U.S. at 25, n.2, 111 S. Ct. at 1651, n. 2.

In any event, even if Petitioner had properly raised these claims below, they would have been immediately dismissed as inconsistent with established U. S. Supreme Court decisional law and North Carolina contract law. In reaching its decision below, the Court of Appeals properly looked to state common law contract analysis to determine whether there was a valid underlying agreement between Petitioner and Respondent to arbitrate their disputes. Pet., p. A6a. In concluding that such an agreement existed, the court relied on the record evidence showing that both parties were bound by the agreement to find that these mutual promises to abide by the provisions of the DRP and to relinquish the right to pursue certain disputes in court were sufficient consideration to support the DRP agreement under North Carolina contract law. Pet., p. A9a.

The Court of Appeals, in its ruling, rejected Petitioner's alternative argument that, even if there had been sufficient

consideration, there was no mutual *agreement* to be bound by the terms of the DRP. Pet., p. A9a. The court stated that, because the record demonstrated that Petitioner continued in Respondent's employment with actual notice that the terms of the DRP would be mutually effective, Petitioner knew that the terms of the DRP would apply to her and therefore assented to the program. Pet., pp. A10a-A11a.

While Petitioner now argues that the lower court erred in its ruling because Respondent's DRP conflicts with "well-settled principles of contract law," she does not bother to cite to any North Carolina decisional law to support her contention. Pet., p. 6. Rather, Petitioner merely refers to a portion of the language of Section 22B-10 of the North Carolina General Statutes without any explanation of how that language is relevant to her argument. To the extent, however, that Petitioner relies on Section 22B-10 in an attempt to argue that the DRP's arbitration provision is unconscionable and, therefore, unenforceable, such an argument is without merit.

Section 22B-10 provides that

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.
>
> *N.C.G.S. § 22B-10.*

In interpreting that language, North Carolina courts have expressly held that an agreement to arbitrate is not an unenforceable contract requiring waiver of a jury trial. *Miller*, 118 N.C. App. at 416, 455 S.E.2d at 681.

Petitioner's argument with respect to federal arbitration

law suffers from a similar fatal flaw. As Petitioner correctly points out in her petition, this Court has already held that mere inequality in bargaining power is not a sufficient reason to find that an arbitration agreement in the employment context is unenforceable under Sections 2 and 4 of the FAA. *Gilmer*, 500 U.S. at 33, 111 S. Ct. at 1655; 9 U.S.C. § 2. Grounds for revocation of an arbitration agreement under the FAA may exist only where there are well-supported claims that the agreement resulted from fraud or overwhelming economic power. *Id.* at 25, 111 S. Ct. at 1656.

Here, the lower court found that Petitioner continued working for Respondent with actual notice that the terms of the DRP would apply to her should she remain in Respondent's employ. Pet., pp. A10a-A11a. In fact, as the lower court found, the record showed that Petitioner acknowledged to a government agency that she knew of the DRP and that she had actually utilized its procedures to her advantage prior to her termination. Pet., p. A11a. Such findings do not indicate that Petitioner was either coerced or defrauded into agreeing to the DRP, as is required to set aside an arbitration agreement under the FAA. *Gilmer*, 500 U.S. at 25-26, 111 S. Ct. at 1656. Thus, for these reasons, as well as those discussed above, Petitioner's claim that her petition should be granted because the DRP is unenforceable must be dismissed as groundless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

W. R. Loftis, Jr.*
Constangy, Brooks & Smith, LLC
101 S. Stratford Road, Suite 300
Winston-Salem, NC 27104-4224
(336) 721-1001

Counsel for Respondent

* Counsel of Record